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JEFFERSON CIRCUIT COURT

CHANCERY BRANCH, FOURTH DIVISION

No. 149271

LOUISVILLE LODGE No. 6, FRATERNAL ORDER OF POLICE, Et Al. - - - - - - - *Plaintiffs*

v.

GEORGE BURTON, Et Al. - - - - *Defendants*

OPINION

This action was brought by the plaintiffs who allege that plaintiff, Bert J. Heuser, was arbitrary and capriciously suspended from his employment as a police officer because he refused to withdraw as candidate for the office of an alderman in the forthcoming Democratic primary in the City of Louisville. Plaintiffs ask the Court for a declaration of rights.

Oral argument was held on May 6, 1971 and the parties are all agreed that there is no genuine issue of fact and that the only question the Court must decide is whether or not the Chief of Police is justified in suspending the plaintiff because of his candidacy for the office of alderman.

KRS 90.220(2) states as follows:

> "No person in the classified service, and neither the Personnel Director nor any member of the Board, nor the Chief of Policemen, Assistant Chief of Policemen, Chief of Firemen, Assistant Chief of Firemen, shall directly or indirectly, give, solicit, receive, or remit, any assessment, subscription, or contribution, to or for any political party or any candidate for public

office, or in any manner be concerned therewith; nor shall any such person be a member of any campaign committee or governing committee of any political organization nor an officer in either; nor shall any such person be an election officer or work at the polls on election day, or participate in the purgation or registration of voters, provided, however, nothing herein shall prevent any such person from freely expressing his or her views as a citizen or to cast his or her vote in any election."

A later statute, KRS 95.015 provides as follows:

"Members of the police and fire departments in cities shall abide by and adhere to the rules, regulations and laws set forth by the Kentucky Revised Statutes, and the legislative body of the city in which they are employed, provided that no such rule, regulation or law shall apply that alters, abridges or otherwise restricts the constitutional rights of said members and said members, except when on duty, shall not be restrained from exercising their rights and privileges or from entering into any endeavor enjoyed by all other citizens of the city in which they reside."

Civil Service Rule II, Section 4 states as follows:

"Political Activity (Amendment Number XXI, Adopted 9 August 1962) Persons holding positions in the classified service shall not be discriminated against in any way because of their political or religious opinions or affiliations or because of their exercise of their right to vote as they please.

No person in the classified service, nor any person on leave of absence from a position in the classified service, and neither the Personnel Director nor any mem-

ber of the Board, nor the Chief of Police, Assistant Chief of Police, Chief of Firemen, nor Assistant Chief of Fireman, shall directly or indirectly, give, solicit, receive, or remit any assessment, subscription or contribution, to or for any political party, or any candidate for public office, or in any manner be concerned therewith; nor shall any such person be a member of any campaign committee, or governing committee of any political organization nor an officer in either; nor shall any such person be an election officer or work at the polls on election day, or participate in the purgation or registration of voters; or in any manner be concerned therewith, provided, however, that nothing herein shall prevent any such person from freely expressing his or her views as a citizen or from casting his or her vote in any election.

Any person who shall violate this section shall be summarily dismissed from the service by the appointing authority, (or, if a member of the Board, by the Mayor,) and may not be employed in any service of the City, classified or unclassified, for a period of one year next thereafter; provided, however, that should the appointing authority fail or refuse to so dismiss, the Board (except when a member thereof is charged with violation of this section) shall conduct a hearing, which the accused person may attend with counsel. If the Board finds the accused guilty of violation of this section, the Board shall dismiss such violator, with the consequent disqualification. Such action of the Board is final."

Examining first KRS 90.220, Section 1 to determine from its language the intent of the legislature, we see that the statute explicitly prohibits the giving or receiving, soliciting or remitting of any assessment, subscription, or con-

tribution to or for any political party or any candidate for political office. These words are very positive and indicate the legislature's strong intent to keep the person named in the statute from being involved in any way in the passing of any money for political purposes. This interpretation is reinforced by the use of the words "or in any manner be concerned therewith" which follows immediately upon the prohibition against giving and receiving contributions.

The Court takes judicial notice of the fact that each candidate for political office must post a filing fee of $1. See KRS 119.250. Furthermore, every candidate for political office who has any asperation of succeeding must expect that some money will be expended on his behalf. If successful in the primary race, he can expect that his political party will call upon his for a direct financial contribution to the party. The Court has been in three political elections and will take notice of the fact that practically every candidate engages in the practice of passing out cards with his name and the office which he seeks on them. This, of course, requires the expenditure of funds for a political purpose.

It is true that the legislature did not include in the statute the words "nor shall any such person be a candidate for office." However, in the second part of this statute there follows another list of prohibitions which prevent the persons in the Civil Service from being members of any campaign committee, or governing committee of a political organization, and further prohibits being an officer in such an organization and also prohibits working at the polls or being an election officer or prohibits them from participating in the purgation or registration of voters. These prohibitions again indicate strongly that the legislative intent to disassociate Civil Service employees from any form of political activities.

It is true that the last part of KRS 90.220 (1) provides that nothing shall prevent anyone in the Civil Service from

freely expressing his or her views as a citizens or casting his or her vote in an election but nothing is said impowering such persons to express their views as a candidate.

It is a well established rule of statutory construction that the power granted by statute is not limited to that which is expressly conferred but includes that which is necessarily or fairly implied in or incident to the accomplishment of the things which are expressly authorized. See *Long* v. *Mayo,* 271 Ky. 192, 111 S. W. 2d 633, and *Dodge* v. *Jefferson County Board of Education,* 298 Ky. 1, 181 S. W. 2d 406 and many other cases cited under key note 185, West Digest on Statutes, Volume 17-A. In the instant case it is very obvious that the legislature meant to accomplish what has been described as the political sterilization of public Civil Service employees. It is obvious that this purpose could not be accomplished if such employees are to become candidates for public office while so employed and to receive contributions for their candidacy and to solicit same or have others solicit for them. Therefore, the Court holds that it is necessarily implied from the words contained in the statute that the legislature intended to prohibit Civil Service employees from participating as candidates in political elections as a condition of their employment.

KRS 95.015 in effect provides that members of the Police and Fire Department shall adhere to Kentucky Revised Statutes and the ordinances of the City of Louisville which state that no such rule or law shall abridge the constitutional rights of such members and that such members except when on duty shall not be restrained from exercising their rights and privileges and enjoying endeavors enjoyed by other citizens.

At first blush this statute might tend to throw some question upon the applicability of KRS 90.220 (1) to political activities by members of the Police and Fire Depart-

ment. However, it is the belief of the Court that this section was inacted for the purpose of granting to Police and Fire Department members the right to engage in other lines of employment other than their department except when they are on duty. A suggestion was made by counsel for plaintiffs that Mr. Heuser could be a candidate 16 hours a day and a noncandidate when he was on duty. This would require Mr. Heuser and his supporters a degree of compartmentalization that simply could not be met by any human seeking office. For example, it is well known that political candidates must have political supporters and persons who are engaged in advocating their election at many different times. Any form of advertising such as billboards, radio spots, the sending of cards and other correspondence must take place often without the candidate knowing at what times and places these efforts are being exerted in his behalf.

Counsel for plaintiff has called to the Court's attention the cases of *Kinnear* v. *City of San Francisco,* 392 Pacific 2nd 391; *Minnelly* v. *Oregon,* 411 Pacific 2nd 1969; and *Fort* v. *Civil Service Commission of County of Alameda,* 61 California 2nd 331, 392 Pacific 2nd 385 as well as the annotation in 28 ALR 3rd 317, et. seq.

These cases and the annotation point out the fact that the Courts have become since 1952 when the Supreme Court decided the case of *Adler* v. *Board of Education of the City of New York,* 342 U. S. 485, 96 Law Edition 517 much more solicitous about the First Amendment rights of public employees. A very interesting summary of Supreme Court cases appears on Pages 71 through 77 of the Minnelly case, supra. The holdings in these cases indicate that statutes which curtail the First Amendment rights of public employees must be based upon a compelling State interest warranting the passage of legislation curtailing these rights. However, no mention is made in the Minnelly case or in the

annotation of the Supreme Court having overruled the case of *United Public Workers* v. *Mitchell,* 330 U. S. 75, 91 Lawyer's Edition 754, 67 Supreme Court 556 which holds that the Hatch Act prohibits the participation by Federal Civil Service employees in political activities is valid even though it curtails somewhat the freedoms of the Civil Service Employees under the First, Ninth, and Tenth Amendments. In that case it might be noted that Justice Reed pointed out that he did not find persuasive appellant's arguments that political activities during free time are not subject to regulation although political activities cannot be indulged in during working hours. His point was that people seeking political office do not lose their political hue merely because they have a job apart from the office they seek.

It is not necessary for the Court to speculate as to what the attitude of the United States Supreme Court will be in the future towards the Hatch Act should it be challenged again as an infringement upon constitutional rights. Suffice it to say that constitutionality of the statutes at issue in this action have not been challenged by the plaintiffs and, therefore, should not be decided by this Court. Students of this very interesting subject are urged to read the entire annotation at 28 ALR 3rd 717 since it contains many cases involving the question at issue.

In conclusion, the Court holds that the suspension of Mr. Heuser is not aribtrary or capricious. The City of Louisville may present a judgment in accordance with this opinion at the Motion Hour on Thursday, May 13, 1971, at 11:00 A.M.

JEFFERSON CIRCUIT COURT

CHANCERY BRANCH, FOURTH DIVISION

No. 149271

LOUISVILLE LODGE NO. 6, FRATERNAL ORDER OF POLICE, ET AL. - - - - - - - *Plaintiffs*

v.

GEORGE BURTON, ET AL. - - - - - *Defendants*

JUDGMENT

This cause coming on to be heard on the pleadings and arguments by Counsel on May 6, 1961, and the Court being sufficiently advised;

IT IS ORDERED AND ADJUDGED:

That Bert T. Heuser the Plaintiff herein was subject to the provisions of KRS 90.220 Sub-Section 2 and KRS 95.015 and Civil Service Rule II, Section 4, which proscribes those activities in which he engaged as a candidate for the Board of Aldermen for the City of Louisville.

The suspension of this Plaintiff was not arbitrary and capricious.

This Courts opinion with its Findings of Facts and Conclusion of Law are by reference made a part hereof.

The Complaint herein is hereby dismissed.

COURT OF APPEALS OF KENTUCKY

RENDERED: JANUARY 31, 1975

No. S-182-71

LOUISVILLE LODGE No. 6, FRATERNAL ORDER OF POLICE and
BERT J. HEUSER - - - - - - - - *Appellants*

v.

GEORGE BURTON, Director of Public Safety and
LOUISVILLE CIVIL SERVICE BOARD - - - *Appellees*

Appeal from Jefferson Circuit Court
Chancery Branch, Fourth Division
Honorable Charles M. Allen, Judge
No. CA 149271

OPINION OF THE COURT BY COMMISSIONER CULLEN—AFFIRMING

This appeal presents the issue of whether KRS 90.220(2) properly and validly was construed by the circuit court as forbidding a person in the classified service of the City of Louisville from becoming a candidate for a party nomination for an elective office of the city.

Bert J. Heuser, a police officer of the City of Louisville, sought nomination in the primary as the Democratic candidate for the office of city alderman. When he refused to withdraw he was suspended by the Chief of Police for alleged violation of KRS 90.220(2). The suspension was approved by the Director of Public Safety of Louisville and by the Louisville Civil Service Board. Thereafter Heuser

and Louisville Lodge No. 6, Fraternal Order of Police, as collective bargaining representative for some 600 policemen of Louisville, brought the instant action in the circuit court seeking a declaration that the statute does not prohibit a person in the classified service from becoming a candidate for a party nomination for an elective office of the city, and a judgment restoring Heuser to his position with back pay.

The circuit court entered judgment dismissing the complaint, based on findings that the statute by necessary implication prohibited a person in the classified service from becoming a candidate for a party nomination for an elective office of the city, and a conclusion that the constitutionality of the statute was not in issue. The plaintiffs have appealed from the judgment and this court has permitted the filing of an amicus curiae brief on behalf of the Louisville Professional Firefighters Association, Local No. 345, I.A.F.F., which brief of course makes arguments in support of a reversal of the judgment.

The appellants do not in terms argue that KRS 90.220-(2) is unconstitutional. Their principal argument is that it does not prohibit a candidacy of the nature here involved. However, a part of that argument is that the statute should not be construed to make such a prohibition because such a prohibition would be unconstitutional. The brief amicus curiae directly argues that if the statute is to be so construed it is unconstitutional.

The statute is as follows:

> "No person in the classified service, and neither the Personnel Director nor any member of the Board, nor the Chief of Policemen, Assistant Chief of Policemen, Chief of Firemen, Assistant Chief of Firemen, shall directly or indirectly, give, solicit, receive, or remit, any assessment, subscription, or contribution, to or for any political party or any candidate for public office, or in

> any manner be concerned therewith; nor shall any such person be a member of any campaign committee or governing committee of any political organization nor an officer in either; nor shall any such person be an election officer or work at the polls on election day, or participate in the purgation or registration of voters; provided, however, nothing herein shall prevent any such person from freely expressing his or her views as a citizens or to cast his or her vote in any election."

Putting aside the constitutional considerations, this court agrees with the circuit court that the statute by necessary implication does prohibit a person in the classified service from becoming a candidate for a party nomination for an elective office of the city. The express words of the statute forbidding a person in the classified service from making a contribution to a candidate or in any manner being concerned with a candidate do not purport to apply only to candidates other than the person himself. This court is of the opinion that the obvious purpose of the statute to forbid partisan political activity by persons in the classified service would be frustrated if candidacy was not embraced in the prohibition.

There is a serious question, however, of whether the statute constitutionally may make such a prohibition other than in express unequivocal words. In United States Civil Service Commission v. National Association of Letter Carriers, 413 U. S. 548, the Supreme Court held that a statute *in plain and understandable language* may forbid a civil service employe from becoming a partisan candidate for, or campaigning for, an elective public office.[1] The Court in the Letter Carrier case found that the prohibitions of the Hatch Act were sufficiently clear and understandable in that

[1]This eliminated any precedential force of the holding of such cases as Minielly v. State of Oregon, Ore., 411 P. 2d 69, that a state does not have a sufficient compelling government interest to bar an employe's First Amendment right to be a candidate for a public office.

the pre-1940 rules of the Civil Service Commission, to which the Act made reference for construction, were plain and unequivocal.

This court is of the opinion that the implication in KRS 90.220(2) of the prohibition against candidacy is so obvious that the prohibition may be considered to be expressed in plain and understandable language within the requirement of the Letter Carrier case.

The judgment is affirmed.

All concur.

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THE COMMONWEALTH OF KENTUCKY,
The Court of Appeals
75 Term—January 31, 1975

LOUISVILLE LODGE #6, FRATERNAL ORDER OF POLICE and
BERT J. HEUSER

v.

GEORGE BURTON, Director of Public Safety and
LOU. CIVIL SERVICE BOARD

Appeal from a Judgment of the Jefferson Circuit Court
CA # 149271,
File # S-182-71

MANDATE

The Court being sufficiently advised, it seems there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellees recover of the appellants their cost herein expended.

(s) Frances Jones Mills

FRANCES JONES MILLS, C.C.A.
By ....., D.C.

A copy—Attest:
Issued March 4, 1975